86 1771

No.

In the Supreme Court of the United States

October Term, 1986

STUDENT ROE, a Minor, by her Next Friend and Natural Guardian, M. ROE,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, SECRETARY OF EDUCATION, MARGARET A. SMITH, in Her Official Capacity
and
COMMONWEALTH OF PENNSYLVANIA, EXECUTIVE SECRETARY, STATE BOARD OF EDUCATION, JEFFREY GROTSKY, in His Official Capacity
and
COMMONWEALTH OF PENNSYLVANIA, MEMBERS, STATE BOARD OF EDUCATION, JOHN HERSHEY, SISTER LAWREACE ANTOUN, MADGE BENOVITZ, KEITH DOMS, ANNA LEE DOWLING, DONALD FOX, EARL HORTON, PAULETTE JOHNSON, WILLIAM KIMMEL, HERBERT LAUTERBACH, ROBERT BARENSFELD, NICHOLAS PANAGOPLOS and FRANK SULLIVAN, in Their Official Capacities
and
BENSALEM TOWNSHIP SCHOOL DISTRICT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether Pennsylvania's administrative regulations at 22 Pa. Code §§13.1 & 341.1, which create a preferred educational classification for "gifted" public school students, confer upon all of Pennsylvania's public school students, but specifically Plaintiff, a property interest in said "gifted" classification, which is protected by the Fourteenth Amendment to the United States Constitution, thus requiring the State to provide *prior* notice of intent to exclude any public school students from said classification or educational assignment?

II. After self-initiating the prescribed "due process" procedures, whether Plaintiff was entitled to a "least restrictive" standard of analysis of her application for gifted special education assignment, because:

A. Pennsylvania implicitly agreed in its Court approved settlement with the Pennsylvania Association for Retarded Children, that under Pennsylvania's Constitution, Art. III, §14, education is a guaranteed right and, thus, "fundamental" for purposes of equal protection analysis under Pennsylvania's Constitution, Art. III, §32, *and*

B. The United States Constitution, Amendment XIV, forbids Pennsylvania from applying different standards of equal protection analysis or educational guarantee as between handicapped and non-handicapped public school students without a reasonable basis for the disparate treatment; *and*

C. There is no rational reason for Pennsylvania to apply a "least restrictive alternative" standard of analysis to the Applications of public school students for handicapped special education, but not to the Applications of public school students for gifted special education;

OR

D. Congress' predication of the Education of the Handicapped Act upon the Amended Consent Decree in the PARC case, which implicitly regards education to be a fundamental right in Pennsylvania under Pennsylvania's Constitution, creates an impermissible dichotomy in the nature of federal educational rights guaranteed, as between handicapped and non-handicapped public school students, under the United States Constitution, Amendment V;

OR

E. In the specific context of educational assignment, the Free Speech Clause of the United States Constitution, Amendment I, affords public school students a "least restrictive" standard of analysis of their applications for educational assignment, and a "strict scrutiny" test of their claims of denial of the equal protection of the laws.

III. Whether Pennsylvania's administrative regulations at 22 Pa. Code §§13.1 & 341.1, which create and establish gifted special education, are ***substantially*** related to the State's statute creating and establishing the general special education classification, which is well documented to have been historically for the purpose of remediating physical handicaps to learning?

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AND

BENSALEM TOWNSHIP SCHOOL DISTRICT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner Student Roe, a minor, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on February 2, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is not reported, but is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion and order of the United States District Court for the Eastern District of Pennsylvania (Lord, S. J.) is reported at 638 F.Supp. 929, and is reprinted in the appendix hereto, p. 5a, *infra*.

The opinion and order of the Pennsylvania Secretary of Education is unofficially reported at Special Education Opinion No. 246, and is reprinted in the appendix hereto, p. 15a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 20 U.S.C. §1415(e) (4) and 28 U.S.C. §§1331 & 1343, the Petitioner brought this suit in the Eastern District of Pennsylvania. On June 26, 1986, the Eastern District granted the Respondents' Motion for Judgment on the Pleadings and dismissed Petitioner's Complaint. See Appendix p. 13a, *infra*.

On Petitioner's appeal, the Third Circuit on February 2, 1987, entered a judgment and a memorandum opinion affirming the Eastern District's order directing that petitioner's Complaint be dismissed for failure to state a

claim for relief under either 20 U.S.C. §1415(e) (2) or 42 U.S.C. §1983. See Appendix p. 2a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictement of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States, nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PENNSYLVANIA CONSTITUTION, ARTICLE III.

Section 14. Public school system.

The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.

* * * * *

Section 32. Certain local and special laws.

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:

[Numbers 2 through 8 are omitted as not relevant.]

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special laws may be passed.

PENNSYLVANIA SCHOOL CODE OF 1949, AS AMENDED.

24 P.S. §13-1371. Definition of exceptional children; reports; examination.

(1) The term "exceptional children" shall mean children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes.

(2) It shall be the duty of the district superintendent, in every school district in accordance with rules of procedure prescribed by the Superintendent of Public Instruction, to secure information and report to the proper intermediate unit, on or before the fifteenth day of October of each year, and thereafter as cases arise, every exceptional child within said district. As soon thereafter as possible the child shall be examined by a person certified by the Department of Public Instruction as a public school psychologist, and also by any other expert which the type of handicap and the child's condition may necessitate. A report shall be made to the proper intermediate unit of all such children examined and of all children residing in the district who are enrolled in special classes.

UNITED STATES EDUCATION OF THE HANDICAPPED ACT.

20 U.S.C. §1401. Definitions.

(a) As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

Constitutional Provisions,
Statutes and Regulations Involved

PENNSYLVANIA STATE BOARD OF EDUCATION REGULATIONS.

22 Pa. Code §13.1 Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

[Non-relevant words and terms omitted.]

Exceptional persons—Persons of school-age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational programs, facilities or services and shall include school-aged persons in detention homes and State schools and hospitals.

(i) *Handicapped school-aged persons*—This term shall include the following:

(A) Mentally handicapped persons who are educable mentally retarded, trainable mentally retarded, severely and profoundly mentally retarded and socially and emotionally disturbed.

(B) Physically handicapped persons who are physically handicapped, brain damaged, learning disabled, speech or language impaired, visually handicapped and hearing impaired.

(C) Multihandicapped persons who have two or more severe handicaps as defined in clauses (A) and (B).

(ii) *Gifted and talented school-aged persons*—Those who, in accordance with criteria prescribed in standards developed by the Secretary of Education, have outstanding intellectual or creative ability, the development of which

requires special activities or services not ordinarily provided to regular children by local educational agencies.

PENNSYLVANIA DEPARTMENT OF EDUCATION STANDARDS.

22 Pa. Code §341.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

[Non-relevant words and terms omitted.]

Exceptional persons—Those persons evaluated in accordance with this chapter as being hearing impaired, mentally gifted and talented, mentally retarded, physically handicapped, learning disabled, brain damaged, speech and language impaired, socially and emotionally disturbed, visually impaired, or severely multihandicapped. These terms are further defined as follows:

(i) *Brain damaged*—[Definition omitted.]

(ii) *Hearing impaired*—[Definition omitted.]

(iii) *Learning disability*—[Definition omitted.]

(iv) *Mentally gifted*—Outstanding intellectual and creative ability the development of which requires special activities or services not ordinarily provided in the regular program. Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.

(v) *Mentally retarded*—Impaired mental development which adversely effects the educational performance

of a person. A mentally retarded person exhibits significantly impaired adaptive behavior in learning, maturation, or social adjustment as a result of sub-average intellectual functioning. The degree of retardation and the level of social and academic functioning, not deviant behavior patterns, shall be the factors in determining the individualized program. A person shall be assigned to a program for the mentally retarded when the evaluation and Individualized Education Program indicate that such a person is appropriate; provided that no person shall be assigned to a program for the:

(A) educable mentally retarded unless the IQ score of that person is lower than 80;

(B) trainable mentally retarded unless the IQ score of that person is lower than 55; or

(C) severely and profoundly mentally retarded unless the adaptive behavior of that person is so severely impaired that education programing is oriented to behaviors which may be considered absolutely basic to higher levels of skilled performance; individuals with an IQ score lower than 30 may be considered for these programs and shall be evaluated by a physician prior to assignment.

(vi) *Physically handicapped*—[Definition omitted.]

(vii) *Severely multihandicapped*—[Definition omitted.]

(viii) *Socially and emotionally disturbed*—[Definition omitted.]

(ix) *Speech and language impaired*—[Definition omitted.]

(x) *Talented*—Outstanding talent as identified by a team of educators and professionals competent in the areas on art, music, dance, photographic arts, or theater, the development of which requires special activities or services not ordinarily provided in the regular program. A person identified as talented shall be eligible to attend the Governor's School for the Arts.

(xi) *Visually impaired*—[Definition omitted.]

[Remaining non-relevant words and terms omitted.]

UNITED STATES DEPARTMENT OF EDUCATION REGULATIONS.

Chapter III. Office of Special Education and Rehabilitative Services.

PROTECTION IN EVALUATION PROCEDURES.

34 C.F.R. §300.532. Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) [Omitted as not relevant.];

(2) Have been validated for the specific purpose for which they are used; and

(3) [Omitted as not relevant.];

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) [Omitted as not relevant.];

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

34 C.F.R. §300.533. Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services an individualized education program must be developed for the child in accordance with §§300.340-300.349 of Subpart C.

LEAST RESTRICTIVE ENVIRONMENT.

34 C.F.R. §300.550. General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.

34 C.F.R. §300.552. Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under §300.551 are available to the extent necesssary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or the quality of services which he or she needs.

STATEMENT OF THE CASE

Petitioner has been a public school student in Pennsylvania for eleven years. In 1986, she instituted this civil rights action, also sounding under the Education of the Handicapped Act, pursuant to 42 U.S.C. §1983 and 20 U.S.C. §1415(e) (2). The jurisdiction of the District Court was invoked under 28 U.S.C. §§1331 and 1343, and 20 U.S.C. §1415(e) (4). The complaint alleged that, from the time she commenced her public school education in 1976 until she requested a Due Process Hearing in 1984, in order to determine her eligibility for Gifted Special Education pursuant to Pennsylvania State Board of Education Regulations and Pennsylvania Department of Education Standards, 22 Pa. Code §§13.1 & 341.1, she had never been given notice that she was being excluded from gifted special education or, indeed, that gifted special education existed and that she could request assignment to the gifted special education curriculum. Thus, petitioner complained that she had been denied of a significant property interest, the justification for which was plausibly disputed, without prior notice or opportunity to be heard. Additionally, Petitioner alleged in her complaint that Pennsylvania denied her the equal protection of the laws in two respects. First, she alleged that the gifted and talented classification created by the Pennsylvania Board of Education's promulgation of the definition of "exceptional persons" at 22 Pa. Code §13.1, offends the Equal Protection Clause, because its purpose is not *substantially* related to the purpose of the General Assembly's enabling legislation for special educa-

tion, which historically was to remediate physical handicaps to learning. Second, Petitioner complained that Pennsylvania denied her the equal protection of the laws when the special education hearing officer refused to judge her application for gifted special education in accordance with a least restrictive alternative standard, and again when the Secretary of Education affirmed the decision of the hearing officer that in Pennsylvania the least restrictive alternative standard of educational assignment is not required by law. The complaint alleged that Petitioner was entitled to the least restrictive alternative standard in her application for gifted special education, because Pennsylvania's Constitution explicitly guarantees a free public education to all its school-aged children, including Petitioner, and that the Secretary of Education in 1972, had explicitly and implicitly recognized the "fundamentality" of education in Pennsylvania, and had agreed to "strictly scrutinize" the equal protection complaints of mentally handicapped children in the Amended Consent Decree approved for the settlement of *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, Secretary of Education*, 343 F.Supp. 279 (ED PA 1972) (hereinafter referred to as *PARC v. Pa., Sec. of Ed., or "PARC II"*). Thus, Petitioner alleged that Pennsylvania denied her the equal protection of the laws guaranteed to her by the United States Constitution, Amendment XIV, when its special education hearing officer and Secretary of Education did not judge her application for gifted special education by the same standard as it is bound by law to judge the applications of public school students for handicapped special education. Petitioner further alleged that because the *PARC* case became the basis of the 1975 federal Education of All Handicapped Children Act and incorporated the "least restrictive" terms of the

Amended Consent Decree of the *PARC* case, the dichotomy thus created as between the educational right of handicapped and non-handicapped children by the different renderings of education as either "fundamental" or "non-fundamental" by Congress in 1975, and this Court in 1973, by its decision in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, is impermissible under the United States Constitution, Amendment V. Lastly, Petitioner inplicitly alleged that the Free Speech Clause of the United States Constitution, Amendment I, in the context of this case, also entitled her to a "least restrictive alternative" standard of review of her application for gifted special education.

Petitioner's alleged denial of procedural due process of law is based upon the following facts and theories: (1) Pennsylvania created in her and all public school students, a property interest in gifted special education, when its agencies created the educational assignment, admitted to be an assignment preferred to regular education, by their promulgation of the definition of "exceptional persons" as including "gifted and talented" children at 22 Pa. Code §§13.1 & 341.1; (2) Petitioner's grade point average of 4.0, standardized achievement test scores in the ninetieth percentile nationwide, teacher comments, extracurricular activities, and an IQ test score of 121, gave her a putative claim of entitlement to assignment to gifted special education; and (3) she had never been notified by the State or any of its agencies at any time, since the commencement of her public school education in 1976, that an assignment to gifted special education existed, that she was being excluded from it, *or* that if she believed she was not receiving a public education appropriate to her needs and learning abilities, she could request a hearing on her complaint and

possibly have her grievances redressed by assignment to gifted special education.

Petitioner's alleged denial of the equal protection of the laws under the United States Constitution, Amendment XIV, is based upon two separate and distinct theories. First, the complaint alleged that the State's regulations creating gifted special education through definitions at 22 Pa. Code §§13.1 & 341.1, are not *substantially* related to the State's legislation creating the special education classification in the first instance, which historically was for the purpose of remediating physical handicaps to learning. Second, the complaint alleged that Pennsylvania's refusal to accord her a "least restrictive alternative" standard in the determination of her application for gifted special education, denied her the equal protection of the laws under the Fourteenth Amendment, because the State accords that standard of review to the applications of handicapped children applying for special education. Moreover, Petitioner alleged that the Pennsylvania Secretary of Education had, in part, predicated his settlement with the Pennsylvania Association for Retarded Children in *PARC v. Pa., Sec. of Ed., supra,* upon his acknowledgement of the claim of *PARC*, that under Pennsylvania's Constitution, Article III, section 14, a free public education is guaranteed to all Pennsylvania school-aged children, thus requiring a "strict scrutiny" test of equal protection analysis under Pennsylvania's Constitution, Article III, section 32, and application of a "least restrictive alternative" standard of reviewing applications for assignment to either special education or regular education. Thus, Petitioner complained that she was denied the equal protection of the laws when her application for gifted special education was not reviewed by the same standard as the applications of handicapped chil-

dren for assignment to either special education or regular education.

Petitioner's complaint also alleges that she is denied the equal protection of the laws implicitly guaranteed to her by the United States Constitution, Amendment V, because the Education of All Handicapped Children Act, now renamed the Education of the Handicapped Act, is based upon and incorporates the terms and provisions of the Amended Consent Decree of *PARC v. Pa., Sec. of Ed., supra,* which terms and provisions, in part, were based upon the parties' joint recognition that in Pennsylvania public education is a constitutionally guaranteed right and, thus, deemed "fundamental", whereas this Court's decision in *San Antonio Independent School District v. Rodriguez, supra,* held that education is not a right guaranteed by the United States Constitution and, thus, not a federal "fundamental" right for purposes of constitutional construction. Petitioner, therefore, alleges that there is an impermissible dichotomy created as between the nature of the educational rights held by the handicapped children and the nature of the educational rights held by non-handicapped children, as a result of the differences in treatment of education by Congress and this Court.

Lastly, Petitioner's complaint implicitly alleges that, in any event, she is entitled to a "least restrictive alternative" standard of review of her application for gifted special education as a matter of her United States Constitutional guarantee to free speech, or the right to receive information and ideas.

Petitioner's complaint also alleged that Pennsylvania denied her the equal protection of the laws by denying her application for gifted special education based upon the

results of an IQ test score, because the test used to make that classification was neither designed for the purpose of determining outstanding mental ability, nor validated for such use. Thus, Petitioner alleged that even under a "rational relation" test of equal protection analysis, Pennsylvania had denied her the equal protection of the laws. However, that question is not here presented to the Court, because it appears that IQ test scores are irrevocably assumed by the American public to do exactly what they say they do, test intelligence. Also, because the inclusion of that issue would likely unduly complicate already complicated issues and detract from the greater importance of those issues.

Petitioner was a middle school student at the time she commenced the due process procedures under Pennsylvania's administrative regulations for special education. Today, Petitioner is concluding her second year of high school, and based upon her cumulative scholastic record, activities and interests, she continues to believe that she is in need of, and would benefit from, an assignment to gifted special education.

In the District Court, the Pennsylvania Defendants filed an Answer with seven affirmative defenses to Petitioner's Complaint. The Pennsylvania Defendants then filed a Motion for Judgment on the Pleadings. The Respondents' Motion for Judgment on the Pleadings was granted by the District Court on June 27, 1986. See Appendix p. 13a, *infra*.

Several aspects of the District Court's opinion granting Respondents' Motion for Judgment on the Pleadings require emphasis:

(1) The District Court rejected Petitioner's claim, that Pennsylvania denied her procedural due process of

law when it failed to notify her that she was about to be excluded from gifted special education, or that gifted special education existed as an alternative to or as an adjunct of regular education, and that she could request a hearing in order to determine her eligibility for assignment to gifted special education, on the basis that she did not have a "property interest" in gifted special education, because she had not demonstrated that she possessed the minimum required IQ score of 130. Thus, the District Court concluded that Petitioner had only "an abstract need or desire for" gifted special education, and not "a legitimate claim of entitlement to it." See Appendix p. 8a, *infra*.

(2) The District Court completely ignored and did not discuss in its opinion, Petitioner's claim that Pennsylvania had already agreed to apply a "least restrictive alternative" standard of review to the applications of handicapped children for special education, and that Pennsylvania's subsequent refusal to apply the same standard of review to her application for gifted special education, impermissibly denied her the equal protection of the laws as guaranteed by the United States Constitution, Amendment XIV.

(3) The District Court likewise ignored and did not discuss in its opinion granting Respondents' Motion for Judgment on the Pleadings, Petitioner's similar argument with respect to the Education of the Handicapped Act and this Court's decision in *San Antonio Independent School District v. Rodriguez, supra,* under the United States Constitution, Amendment V. See Appendix p. 10a, *infra*.

(4) The District Court rejected Petitioner's claim that Pennsylvania denied her free speech or the right to receive information and ideas under the United States Constitution, Amendment I, when it refused to judge her

application for gifted special education by a "least restrictive alternative" standard, on the ground that Petitioner had "not identified any information or ideas which she has been precluded from receiving," in spite of the fact that Petitioner had caused the entire gifted special education curriculum for her grade level at the time of her due process hearing to be placed of record with the hearing officer, and subsequently with the District Court. See Appendix p. 10a, *infra*.

(5) The District Court did not discuss or determine whether Pennsylvania's administrative regulations at 22 Pa. Code §§13.1 & 341.1, which by definition create the gifted special education classification, are *substantially* related to the purpose of Pennsylvania's legislation creating the general special education classification, which historically was for the purpose of remediating physical handicaps to learning. Rather, the District Court decided that there exists a *rational* relationship between the agencies' inclusion of "gifted and talented" children within the definition of "exceptional persons" at 22 Pa. Code §§13.1 & 341.1, and the Legislature's definition of "exceptional persons" at 24 P.S. §13-1371. See Appendix p. 11a, *infra*.

In due course, Petitioner appealed to the Third Circuit from the final Order of the District Court and invoked the Third Circuit's jurisdiction under 28 U.S.C. §1291 to review "final decisions" of district courts.

The Third Circuit thereupon reviewed the opinion of the District Court and found that it had "applied the correct standards", and moreover found that "no reversible error in the disposition of the issues" in the case had been committed. Accordingly, the Third Circuit affirmed the Order of the District Court. See Appendix p. 4a, *infra*.

Several aspects of the Memorandum Opinion of the Third Circuit affirming the Order of the District Court dismissing Petitioner's complaint, also require emphasis:

(1) The Third Circuit did not discuss the merits of the District Court's opinion rejecting Petitioner's claim of denial of procedural due process of law, which was on the basis that Petitioner did not possess a "property interest" in gifted special education so as to require any notice to her prior to being excluded therefrom by the State. The Third Circuit, apparently, accepted the District Court's rationale and application of law on this issue. See Appendix p. 3a, *infra*.

(2) The Third Circuit like the District Court, ignored Petitioner's complaint allegations and briefed arguments that she was entitled to a "least restrictive alternative" standard of reviewing her application for gifted special education, because Pennsylvania had already agreed to apply such standard to the applications of handicapped children for special education and, thus, it would deny Petitioner the equal protection of the laws as guaranteed to her by the United States Constitution, Amendment XIV, not to apply to her application for gifted special education the same standard it was already applying to the applications of handicapped children for special education. Instead, the Third Circuit, like the District Court, held simply that the Petitioner is not entitled to the relief she seeks, because this Court had decided in *San Antonio Independent School District v. Rodriguez, supra,* that education is not a right guaranteed by the United States Constitution, and, thus, not a "fundamental" right for purposes of equal protection analysis. See Appendix p. 3a, *infra*.

(3) Even though Petitioner included in her Appendix large portions of the gifted special education curricu-

lum and pointed out in her Brief that it was the information and ideas contained in that curriculum to which she was denied access, because of the State's refusal to apply a "least restrictive alternative" standard of review to her application for gifted special education, the Third Circuit did not discuss in its Memorandum Opinion affirming the Order of the District Court, Petitioner's contention that she is entitled to a "least restrictive alternative" standard of review as a matter of her Constitutional guarantee to free speech, which includes the right to receive information and ideas. See Appendix p. 3a, *infra*. The District Court's rejection of this claim by Petitioner was premised upon its finding that she had not identified any information or ideas to which she had been denied access.

(4) The Memorandum Opinion of the Third Circuit entirely omits any discussion of Petitioner's claim that Pennsylvania's administrative regulations creating, by definition, the gifted special education classification, 22 Pa. Code §§13.1 & 341.1, are not *substantially* related to Pennsylvania's enabling legislation establishing the general special education classification, which historically was for the purpose of remediating physical handicaps to learning. This omission by the Third Circuit was in spite of the fact that Petitioner had included in her Addendum to her Brief, pertinent copies of Pennsylvania's Legislative Journal tracing the history and purpose of Pennsylvania's enabling legislation for special education, which was unequivocally for the purpose of remediating physical handicaps to learning. See Appendix p. 2a, *infra*.

In short, the Third Circuit, like the District Court, ignored or failed to consider Petitioner's claim of denial of equal protection of the laws through disparate treatment

by Pennsylvania, for which there is no rational basis. The remainder of Petitioner's claims, which were discussed and decided by the District Court, were also rejected by the Third Circuit in a rather summary fashion, without further consideration or discussion of the arguments made by Petitioner in support of her claims on appeal. The Third Circuit's affirmance of the Opinion and Order of the District Court lends little in the way of elucidating the actual issues Petitioner raised in her complaint and on appeal. Thus, whether or not Petitioner's complaint states a cause of action for which relief can be granted, is actually still a matter largely undecided, and to the extent that it has been decided, the rationale for the decision is contained only in the District Court's Opinion and Order. See Appendix p. 4a, *infra*.

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's holding that Plaintiff had no cognizable property interest in gifted special education, thus Plaintiff had no interest protectible by Due Process, conflicts with applicable decisions of this Court.

Pennsylvania's State Board of Education has promulgated that "gifted and talented" children, i.e., those with "outstanding intellectual or creative ability" as defined by the Secretary of Education, are within the "exceptional persons" classification, and, thus, are entitled to assignment to special education as provided by the Legislature at 24 P.S. §13-1371. See 22 Pa. Code §13.1 at p. 8, *supra*. The State's Secretary of Education has defined "mentally gifted" as persons with "outstanding intellectual and creative ability the development of which requires special activities or services not ordinarily provided in the regular program." By regulation of the Pennsylvania Department of Education, children are presumed absolutely to be "mentally gifted", as thus defined, "when they have an IQ of 130 or higher." By deduction, children who have an IQ below 130 are conclusively presumed not to possess "outstanding intellectual and creative ability the development of which requires special activities or services not ordinarily provided in the regular program," except "when other educational criteria in the profile of the person strongly indicate gifted ability." See 22 Pa. Code §341.1 at p. 9, *supra*.

Reasons for Granting the Writ

It would seem clear that the above definitions providing entitlement to special education pursuant to State Statute are "rules or understandings that secure certain benefits", *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), and thus create property interests in school-aged children of Pennsylvania, including your Petitioner. Furthermore, as a result of the PARC Amended Consent Agreement, the Pennsylvania State Board of Education and Secretary of Education promulgated elaborate "Due Process Procedures" in their regulations to protect against unwarranted invasion by the State against children's interest in receiving an appropriate education. These "Due Process Procedures" are specifically made applicable to "gifted and talented" children. See 22 Pa. Code §§13.21, 13.31—.33, 13.62, 341.11—.18 (not re-printed in this Petition, but provided to the Third Circuit in the Addendum to Appellant's brief). More recently this Court has said that a "property" interest is created by "an independent source such as state law", and that the availability of "local-law remedies is evidence of the State's recognition of a protected interest." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9, 11 (1978).

This Court also held in *Goss v. Lopez*, 419 U.S. 565, 575 (1975), that potential damage to a student's later opportunities for higher education and employment invades his or her "liberty interest", thus triggering the need for *prior* notice and opportunity to challenge the invasion as a safeguard against wrongful deprivation. Although not pointed out in the Statement of the Case, *infra*, your Petitioner did point out to the Third Circuit by way of Supplemental Appendix and Reply Facts, that gifted and talented high school students at Petitioner's school—Bensalem High School—receive added weighting factors for gifted

courses for purposes of calculating their class rank. Thus, Petitioner argued, she had suffered the invasion of a liberty interest without benefit of *prior* notice and opportunity to prevent the invasion.

With regard to the claimed "property" interest, however, Petitioner additionally argued below that, unlike handicapped special education, gifted special education is in fact the "preferred" educational assignment, thus *a fortiori* triggering the need for *prior* notice and opportunity to be heard before being excluded from that educational assignment. She argued by way of reverse analogy from the District Court's discussion upon approval of the initial Consent Agreement in the *PARC* case. *See Pennsylvania Association for Retarded Children v. Pennsylvania, Secretary of Education,* 334 F.Supp. 1257 (ED PA 1971) (hereinafter "*PARC I*"). The District Court noted in *PARC I*, and the Amended Consent Agreement of *PARC II* recognized, that assignment to regular education is deemed to be the preferred educational assignment, thus triggering the need of *prior* notice and opportunity to be heard upon the State's intended exclusion of any public school student from *regular* education classes. Therefore, Petitioner argued below that she was entitled to the same notice and opportunity to be heard *prior* to her exclusion from *gifted* special education classes. *See PARC v. Pa., Sec. of Ed. (PARC II), supra* at 307. *See also PARC v. Pa., Sec. of Ed. (PARC I), supra* at 1260.

However, the Third Circuit and the District Court held that because Petitioner did not have an IQ score of 130, she nonetheless did not have a "property" interest in gifted special education. Although Petitioner argued to the Third Circuit that her educational record or profile at least

brought her within the range of being a *putative* "gifted" person, so as to invoke Fourteenth Amendment protection of her as yet undetermined interest in special education, the Court did not recognize any federal protection for such a contingent interest. But Petitioner believes that the Third Circuit's decision is in conflict with prior applicable decisions of this Court.

For instance, in the very case cited by the District Court in support of its holding, *Board of Regents of State Colleges v. Roth, supra* at 577, this Court said that it is the very purpose of "due process" hearings "to provide an opportunity for a person to vindicate those claims", meaning claims of entitlement "grounded in the statute defining eligibility for them." And, as the Court said in *Memphis Light, Gas & Water Division v. Craft, supra* at 11, quoting its earlier decision in *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972): "The Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership." As more recently stated by the Court in *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 434 (1982):

> [T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

Thus, Petitioner believes that the decision of the Third Circuit upholding the District Court's judgment that Petitioner never possessed a "property" interest in gifted special education, which would be protectible by the Fourteenth Amendment, is in error and in plain conflict with this Court's previous applicable decisions.

Likewise, Petitioner believes that she also possessed a cognizable "liberty" interest in gifted special education

from the time she commenced her public school education, and for this reason, also, was denied Due Process by not being given the opportunity for a hearing *prior* to being excluded from a gifted special education assignment and curriculum.

Petitioner's position appears to be supported by this Court's decisions cited above and in its longstanding statement reiterated in *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, at 313, 70 Supreme Ct. 652, at 656, 94 L.Ed. 865.

(Emphasis added.)

Thus Petitioner believes that the Third Circuit has decided two important questions of federal law, which have not been, but should be settled by this Court, and otherwise has decided a federal question in a way in conflict with applicable decisions of this Court.

II.

The Third Circuit's holding that Plaintiff was not entitled to a "least restrictive alternative" standard of review of her application for gifted special education, represents a decision on an important question of federal law which has not been, but should be, settled by this Court.

In 1971, the Pennsylvania Association for Retarded Children (hereinafter referred to as "PARC") brought a landmark class action suit against the Pennsylvania Department of Education Secretary and the Pennsylvania State Board of Education, et al., seeking declaratory and injunctive relief from the state agencies' refusal to admit into its schools and educate some of its handicapped children, and their transferring of other handicapped children, without prior notice or opportunity to be heard, out of regular education and into special education classes or schools. PARC claimed that such children were denied the equal protection of the laws under Pennsylvania's Constitution and the Constitution of the United States. More specifically, PARC contended that the provisions of Pennsylvania's Constitution at Article 3, Section 14, make education in Pennsylvania a "fundamental" right for purposes of equal protection scrutiny, *inter alia*. *See Pennsylvania Association for Retarded Children v. Pennsylvania, Secretary of Education, et al.*, 334 F.Supp. 1257 (ED PA 1971), *modified* 343 F.Supp. 279, 283 (1972). In that case, the Pennsylvania Secretary of Education, represented by the Attorney General of Pennsylvania, agreed with the equal protection claims of the Pennsylvania Association for Retarded Children, and furthermore agreed to grant to the handicapped children the relief they sought upon the basis

that education in Pennsylvania is a "fundamental" or constitutional right. *Id.*, 343 F.Supp. at 299-300 & 307. This interpretation is consistent with prior statements of the Pennsylvania Attorney General in this case, and with interpretations of *PARC I* and *II* by other United States District Courts. *See Mills v. Board of Education*, 348 F.Supp. 866, 873-76 (DC 1972); *William S. v. Gill*, 536 F.Supp. 505, 511 (ND IL 1982). *See also Hobson v. Hansen*, 269 F.Supp. 401, 492-517 (DC 1967), *affirmed sub nom Smuck v. Hobson*, 408 F.2d 175 (DC Cir 1969).

Plaintiff, therefore, has contended upon the basis of this Court's decision in *Logan v. Zimmerman Brush Company, supra* at 438-444, that the Secretary's decision not to review her application for gifted special education according to a "least restrictive alternative" standard, when she is bound by her predecessor's Amended Consent Agreement to do so for handicapped children, *PARC II, supra* at 306 & 316, denies her the equal protection of the laws, which is proscribed by the Fourteenth Amendment to the United States Constitution. Plaintiff contended in her Exceptions to the Hearing Officer's Recommendation, her appeal Complaint to the United States District Court, and in her appeal from the dismissal of her Complaint to the United States Third Circuit Court of Appeals, that not to accord her the same standard of review of her application for special education as Pennsylvania accords to handicapped children, i.e., the least restrictive alternative, effectively creates two classes of public school students: those for whom education is "fundamental" and whose claims of educational abridgement are scrutinized strictly, and those whose educational rights are "non-fundamental" and whose claims of educational abridgement are scrutinized on a "rational" basis. Plaintiff further argued to a logical

conclusion, that this state-created classification does not bear a rational relationship to a legitimate governmental objective, and that the classification must be declared unconstitutional and the disparate treatment enjoined from further practice and implementation. *Logan v. Zimmerman Brush Company, supra*. Neither the Secretary, the District Court nor the Third Circuit discussed, considered or even mentioned this express complaint made by Plaintiff, which was even the central thrust of her complaint and appeal.

Based upon and to the same effect, Plaintiff also argued that because the *PARC* case, *supra*, became the basis of the 1975 federal Education of All Handicapped Children Act, now known as the Education of the Handicapped Act (20 U.S.C. §1400, *et seq.*), and said Act by Congress incorporated the "least restrictive alternative" concept into its placement provisions, which concept is indigenous to education as a "fundamental" right, there has been created an impermissible classification under the United States Constitution, Amendment V: Those for whom education is essentially a "fundamental" right or are entitled to a "least restrictive alternative" standard of placement—handicapped children, *Education of the Handicapped Act*, 20 U.S.C. §1400, *et seq.*, and those for whom education is a "non-fundamental" right or are not entitled to a "least restrictive alternative" standard of educational placement—regular or non-handicapped children, *San Antonio Independent School District v. Rodriguez, supra*. *See also Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 180 & fn. 2, 194-197 & fns. 18 & 21 (1982). Likewise, the agencies and courts below declined to comment or rule upon this challenge.

Finally, Plaintiff argued, that even failing the above arguments, she was nonetheless entitled to a "least restrictive alternative" standard of review of her application for special education, based upon her Constitutional guarantee to freedom of speech, United States Constitution, Amendment I. Plaintiff believes that identification of the Gifted Curriculum as the "information or ideas which she has been precluded from receiving," was sufficient "identification" to implicate her First Amendment Right to freedom of speech. See Appendix p. 10a, *infra*. *See also Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

Thus Plaintiff believes that the Third Circuit has both decided and left undecided, important questions of federal law which have not been, but should be, settled by this Court, or otherwise has decided federal questions in a way in conflict with applicable decisions of this court.

III.

The Third Circuit's affirmance of the District Court's holding, that because there is in its opinion, a rational relationship between the enabling legislation for special education and the agency regulations creating the "gifted" special education classification, the State is not required to show that a *substantial* relationship exists, conflicts with applicable decisions of this Court.

Plaintiff contended in her Exceptions to the Hearing Officer's Recommendation, her appeal Complaint to the United States District Court, and in her appeal to the United States Court of Appeals for the Third Circuit, that

the creation and implementation of Gifted Special Education by virtue of 22 Pa. Code §13.1 and §341.1, is not *substantially* related to furthering the purpose of the enabling legislation for Special Education found at 24 P.S. §13-1371, as amended. The District Court's decision, however, affirmed by the Third Circuit, only considered whether or not the gifted special education classification is *rationally* related to the enabling legislation for special education found at 24 P.S. §13-1371. However, this Court has previously said that a classification drawn must rest upon "some ground of difference having a fair and *substantial* relation to the object of the legislation . . . .", *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (emphasis added). Furthermore, this Court has previously said that "(w)hen the classification in . . . a law is called in question, . . . the existence of that state of facts at the time that the law was enacted must be assumed", *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). On appeal to the Third Circuit, your Petitioner attached as an Addendum to her Brief, copies of pertinent pages from Pennsylvania's Legislative Journals, which clearly showed that Pennsylvania's enabling legislation for special education (24 P.S. §13-1371), originated in 1911 for the purpose of remediating physical handicaps to learning, which purpose has never been stated otherwise by Pennsylvania's legislators. Pennsylvania's Legislative Journal for 1937 also reveals that the lawmakers used the word "exceptional" in lieu of the word "handicapped" in the enabling legislation for special education for that year. Thus, your Petitioner submits that the Third Circuit's affirmance of the District Court's application of a "rational relationship" test to her Equal Protection argument with respect to the justification of the classification of "gifted" special education, was in error and in conflict with applicable decisions of this Court.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

DORIS APPLEBAUM
Counsel for Petitioner

6232 Madison Court
Bensalem, Pennsylvania 19020
(215) 757-1005

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1485

STUDENT ROE, A MINOR BY HER NEXT FRIEND AND NATURAL GUARDIAN, M. ROE,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, SECRETARY OF EDUCATION, MARGARET A. SMITH, IN HER OFFICIAL CAPACITY,

and

COMMONWEALTH OF PENNSYLVANIA, MEMBERS, STATE BOARD OF EDUCATION, JOHN HERSHEY, SISTER LAWREACE ANTOUN, MADGE BENOVITZ, KEITH DOMS, ANNA LEE DOWLING, DONALD FOX, EARL HORTON, PAULETTE JOHNSON, WILLIAM KIMMEL, HERBERT LAUTERBACH, ROBERT BARENSFELD, NICHOLAS PANAGOPLOS AND FRANK SULLIVAN, IN THEIR OFFICIAL CAPACITIES

and

BENSALEM TOWNSHIP SCHOOL DISTRICT,

Memorandum Opinion, Court of Appeals

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 85-1230)
District Judge: Honorable Joseph S. Lord, III

Submitted Pursuant to Third Circuit Rule 12(6)
January 22, 1987

Before: GIBBONS, *Chief Judge,* WEIS, *Circuit Judge* and ZIEGLER, *District Judge.**
Filed FEB 2 1987

MEMORANDUM OPINION OF THE COURT

WEIS, *Circuit Judge.*

This appeal stems from the Pennsylvania Department of Education's refusal to allow plaintiff to participate in an educational program for gifted students because her IQ test score fell below that required for admission. Plaintiff appealed the denial to the United States District Court, which dismissed the complaint.

The court concluded that the federal Education of the Handicapped Act, 20 U.S.C. §§1400 *et seq.*, applied only to handicapped children and consequently, the state's

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* The Honorable Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

placement of plaintiff was within the purview of its own law. Moreover, plaintiff had no cognizable federal liberty or property interest in gifted education and, therefore, the procedure employed by the state did not violate the plaintiff's due process rights. Because it found no suspect class or fundamental right to be implicated, the court evaluated the plaintiff's equal protection claim under a rational relationship standard, and found that the use of IQ scores passed muster. *Student Roe v. Commonwealth of Pennsylvania,* 638 F.Supp. 929 (E.D. Pa. 1986).

Plaintiff maintains that the district court erred in dismissing her due process claims and in holding that the Pennsylvania standards for enhanced educational benefits are matters of state law only. She argues that because gifted education is the preferred assignment, she was entitled to notice and opportunity to be heard before being excluded from the program. She also contends the court erred in finding that the state had not denied her liberty interest in acquiring useful knowledge, and that the equal protection claim should have been evaluated under a strict scrutiny standard. Finally, plaintiff alleges that the trial court erred in finding no infringement of a First Amendment right to receive information and ideas resulting from denial of her access to the gifted student program.

The plaintiff's eligibility is contingent upon her meeting state law qualifications. The relevant Department of Education regulations provide that "[p]ersons shall be assigned to a program for the gifted when they have an IQ of 130 or higher." 22 Pa. Code §341.1(iv) (1979). Plaintiff failed to meet that threshold requirement. Her federal claims depend in large part on establishing education to be a fundamental constitutional right. The Supreme Court, however, has held otherwise. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 33-35 (1973).

Memorandum Opinion, Court of Appeals

We conclude that the district court applied the correct standards, and we find no reversible error in the disposition of the issues in this case. Accordingly, we will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing opinion.

s/Weis
Circuit Judge

FILED JUN 30 1986
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STUDENT ROE, A MINOR, BY HER NEXT FRIEND AND NATURAL GUARDIAN, M. ROE	:	CIVIL ACTION
—v—	:	
COMMONWEALTH OF PENNSYLVANIA, ET AL.	:	NO. 85-1230

OPINION

Lord, S.J. June 27, 1986

Plaintiff, a student in the Bensalem Township School District, raises various statutory and constitutional challenges to her exclusion from gifted education. Suit is brought *in propria persona* by her next friend and guardian, who apparently is an attorney licensed in Pennsylvania and admitted to practice before this court. The Commonwealth of Pennsylvania defendants have moved for judgment on the pleadings. Because I conclude that, taking as true all of plaintiff's allegations, and drawing therefrom all inferences favorable to her, plaintiff can prove no set of facts in support of her claim which would entitle her to relief, *see, e.g., Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980), defendants' motion will be granted.

Count I of plaintiff's complaint alleges a plethora of violations of the Education of the Handicapped Act ("EHA"). 20 U.S.C. §§1400-1454. Plaintiff's argument as to

why the EHA applies to her exclusion from gifted education is, at best, extraordinarily convoluted, difficult to explain and tangled into a veritable legal rat's nest. I shall do my best to unravel the snarl. Plaintiff's argument goes like this:

1. She is not handicapped.

2. The EHA should not apply to her. (It may seem as though I should stop here, but plaintiff continues.)

3. Pennsylvania extends to gifted students the same due process guarantees that it extends to handicapped students. *See* 22 Pa. Admin. Code §§ 13.21, 13.31—.33.

4. Plaintiff then makes the quantum leap to conclude that all aspects of the EHA must be applied to a determination of her entitlement to gifted education. In support of this contention, plaintiff relies on a well-known legal maxim: "You must take the bitter with the sweet."

Having thus unraveled plaintiff's argument, I conclude that it is entirely without merit. Plaintiff concedes that, by its terms, the EHA applies only to handicapped children. *See* 20 U.S.C. §§1400(c), 1401(a) (1). Therefore, plaintiff's "bitter with the sweet" argument notwithstanding, the extent to which Pennsylvania chooses to apply the same procedural protections to its determinations regarding the placement of students in gifted and handicapped educational programs is, within constitutional limitations, *see infra* pp. 6-10, solely a matter of state law.[1] According-

[1] *Geis v. Board of Education*, 774 F.2d 575 (3d Cir. 1985), is not to the contrary. In *Geis*, the court held that state standards of educational

ly, I will grant defendants' motion for judgment on the pleadings as to Count I of plaintiff's complaint.

Count II of plaintiff's complaint alleges that defendants denied her procedural due process. Plaintiff's allegations as to this claim are twofold. First, she alleges that gifted education is the preferred educational placement, and therefore that defendants violated her rights by placing her in regular education classes without prior notice and an opportunity to be heard. Second, she alleges that when she initiated due process proceedings to determine her eligibility for gifted education, the procedures employed by defendants were constitutionally defective.

A threshold issue in any due process inquiry is whether the plaintiff was deprived of a constitutionally protected interest. *E.g., Board of Regents v. Roth*, 408 U.S. 564, 569-71 (1972). Plaintiff argues that because gifted education is the preferred educational assignment, she has both a property and a liberty interest in being placed in gifted education. I disagree.

Property interests are not created by the Constitution, but by independent sources, such as state law. *E.g, id.* at 577. As to placement in gifted education, Pennsylvania law provides as follows:

> Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 *may*

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opportunity for handicapped students are incorporated into the EHA, and therefore enforceable in the federal courts. *Id.* at 579-81. However, because the EHA does not apply to gifted students, Pennsylvania's standards for gifted education are, *ipso facto*, not incorporated into the EHA and are matters of state law only. Therefore, *Geis* is inapposite to the present case.

> be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.

22 Pa. Admin. Code §341.1 (emphasis added).

Assuming, without deciding, that this regulation creates a property interest in gifted education for students with IQs of 130 or higher, it does not confer such an interest upon plaintiff, as she does not allege that her IQ falls within the specified range.[2] To have a property interest in a benefit, a person must have "more than an abstract need or desire for it . . . . He must . . . have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. Neither the provision in the regulation that select students with IQs under 130 may be admitted to gifted programs, nor, if such is the case, the fact that gifted education is the preferred educational assignment, creates in plaintiff a legitimate claim of entitlement to it. *See, e.g., id.* at 578 (discussing factors which would create a legitimate claim of entitlement); *see also Lisa H. v. State Board of Education*, 67 Pa. Commw. 350, 354-58, 447 A.2d 669, 672-74 (1982) (although all children in Pennsylvania have a property interest in participating in the educational process, only exceptional children have a right to an individualized level or quality of education), *aff'd mem.*, 502 Pa. 613, 467 A.2d 1127 (1983). Therefore, I conclude that plaintiff does not have a property interest in being placed in gifted education.

Plaintiff bases her argument that she has a liberty interest in being placed in gifted education on *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the Court listed

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[2] An exhibit attached to plaintiff's complaint shows that she scored 121 on an IQ test.

as a liberty interest the right "to acquire useful knowledge." *Id.* at 399. Apparently, plaintiff believes that *Meyer* bestows upon her a liberty interest in being placed in gifted rather than regular education because gifted education would, in her opinion, expose her to a greater volume of useful knowledge. However, the *Meyer* Court was concerned with access to broad areas of knowledge, *see id.* at 399-403, not with maximizing the volume of knowledge to which an individual is exposed. Thus, plaintiff's argument is spurious, as she has failed to identify, either in her complaint, her brief, or at oral argument, a single area of useful knowledge to which she has been denied access. Therefore, I conclude that defendants have not deprived plaintiff of a liberty interest by denying her placement in a program of gifted education.[3]

Count III of plaintiff's complaint alleges four equal protection and substantive due process violations. Summarized briefly, plaintiff, challenges the creation by the Board of Education of the gifted student classification, the use of IQ scores to define mental giftedness, the fact that students with IQs of 130 or higher are placed in educational programs purportedly designed to maximize their potential, while students with IQs under 130 are not entitled to be placed in such programs, and the fact that only exceptional students, *i.e.*, those deemed gifted or handicapped, are legally entitled to be placed in the least restrictive educational environment.

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[3] Having concluded that plaintiff has neither a property nor a liberty interest in being placed in gifted education, I decline to address defendants' alternative argument that the process afforded plaintiff before denying her placement in a gifted education program was constitutionally adequate.

Initially, I must determine the level of scrutiny to be applied to plaintiff's claims. Scrutiny more rigorous than the "rational relation" standard applies only if a suspect classification is used or a fundamental right is affected. *See, e.g., Vance v. Bradley,* 440 U.S. 93, 96-97 (1979) (equal protection); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124-25 (1978) (substantive due process); *Roe v. Wade,* U.S. 113, 155-56 (1973) (substantive due process). Plaintiff does not argue that defendants have used a suspect classification and she concedes that education is not a fundamental right under the United States Constitution. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 33-35 (1973).[4] However, she argues that two of her fundamental rights are infringed by her exclusion from gifted education: a liberty interest in acquiring useful knowledge, and a first amendment right to receive information and ideas. *See Kleindienst v. Mandel,* 408 U.S. 753, 762-63 (1972). For the reasons heretofore explained, *see supra* p. 5, I reject plaintiff's liberty interest argument, and, because plaintiff has not identified any information or ideas which she has been precluded from receiving, I find her first amendment argument equally unconvincing.

Accordingly, plaintiff's claims must be evaluated under the rational relation standard. Under this standard, the proper inquiry is whether the regulations challenged by plaintiff are "so unrelated to the achievement of any

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[4] In *Rodriguez,* the Court suggested that the absolute denial of educational opportunity might provide a basis for finding an interference with fundamental rights. 411 U.S. at 36-37. *See also Plyler v. Doe,* 457 U.S. 202, 223-24 (1982) (subjecting to heightened scrutiny a state's denial of basic education to undocumented school-age children). However, this issue is not before me, as plaintiff does not argue that she has been denied access to a basic education.

combination of legitimate purposes" that I can only conclude that defendants, in promulgating the challenged regulations, acted irrationally. *Vance*, 440 U.S. at 97; *see also Benner v. Oswald*, 592 F.2d 174, 181 (3d Cir.) (rational relationship test applies to state regulations), *cert. denied*, 444 U.S. 832 (1979)

Plaintiff's argument that the creation by defendants of the gifted student classification is irrational in light of the enabling legislation is not convincing as either a logical or a factual matter. The enabling legislation requires the Board of Education to prescribe standards for the education of all exceptional children, Pa. Stat. Ann. tit. 24, §13-1372(1), and defines exceptional children as those who "deviate from the average . . . to such an extent that they require special educational facilities or services." *Id.* §13-1371. I fail to see how it could be irrational for the Board of Education to conclude that children with high IQs "deviate from the average" and thus come within the purview of the enabling legislation. Moreover, since the creation of the gifted student classification by the Board of Education, the legislature has placed its imprimatur upon the provision of special education to gifted children. *See id.* §13-1372(3); *Lisa H.*, 67 Pa. Commw. at 357 n.6, 447 A.2d at 673 n.6.

Plaintiff's remaining arguments are equally unavailing. Clearly, there are legitimate purposes to which defendants' policies bear a rational relation. Congress has found and declared that "the Nation's greatest resource for solving critical national problems in areas of national concern is its gifted and talented children." Gifted and Talented Children's Education Act of 1978, Pub. L. No. 95-561, §901(b)(1), 92 Stat. 2292, 2292, *repealed by* Omnibus

Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §587(a)(1), 95 Stat. 357, 480. Surely, it is both rational and legitimate for Pennsylvania to provide special education to gifted children in order to develop the abilities of those students most likely to assume leadership roles in areas of endeavor which are intellectually demanding.[5]

This is not to say that one may not question the educational and sociological wisdom of defendants' policies, particularly if, as plaintiff suggests, these policies have a deleterious effect upon students who are not deemed gifted. However, that there are arguments against defendants' policies does not make them irrational for purposes of an equal protection or substantive due process analysis. *See, e.g., Vance*, 440 U.S. at 97; *Exxon*, 437 U.S. at 124-25. Nor, even if there are better methods available, is it irrational for defendants to rely on IQ scores in making their determinations of giftedness. *See Student Doe v. Commonwealth of Pennsylvania*, 593 F. Supp. 54, 57 (E.D. Pa. 1984). Therefore, I hold that, even construing the pleadings in the light most favorable to plaintiff, there is no set of facts that plaintiff might prove in support of her equal protection and substantive due process claims which would entitle her to relief.

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[5] In a section entitled "[s]tatement of purpose," the Pennsylvania regulations governing special education provide that "[i]t shall be the policy of the Board [of Education] . . . to provide exceptional school-aged persons with quality special education programs . . . which will ultimately enable them to participate as fully as possible in appropriate activities of daily living." 22 Pa. Admin. Code §13.2. Certainly, this purpose is legitimate, and providing special education to gifted students, while perhaps not compelled by this policy, is not inconsistent with it. At any rate, where, as here, there are plausible reasons for the challenged action, my inquiry need go no further. *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).

Opinion, District Court
Order

An order granting defendants' motion for judgment on the pleadings will be entered.[6]

s/Joseph S. Lord, III S.J.

ENTERED: 6-30-86
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STUDENT ROE, A MINOR BY HER NEXT FRIEND AND NATURAL GUARDIAN, M. ROE	:	CIVIL ACTION
—v—	:	
COMMONWEALTH OF PENNSYLVANIA, ET AL.	:	NO. 85-1230

ORDER

AND NOW, this 27th day of June, 1986, it is hereby ORDERED that the motion of the Commonwealth of Pennsylvania defendants for judgment on the pleadings is GRANTED and plaintiff's claims against the Commonwealth of Pennsylvania defendants are DISMISSED WITH PREJUDICE.

IT FURTHER APPEARING (i) that defendant Bensalem Township School District ("defendant Ben-

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[6] In their memorandum of law in support of their motion for judgment on the pleadings, defendants raised an abstention argument. However, defendants have since withdrawn that argument, and therefore I have not considered it.

salem") has neither entered an appearance nor answered or otherwise responded to plaintiff's complaint for a period of over one year, (ii) that plaintiff has not filed a motion for a default judgment, thereby failing to prosecute her claims against defendant Bensalem, but (iii) that it would be futile for plaintiff to pursue her claim against this defendant in light of the foregoing opinion, as her claims against defendant Bensalem are identical to those against the Commonwealth defendants, and therefore (iv) that plaintiff's complaint affords a sufficient basis for dismissing her claims against defendant Bensalem, *see Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980), it is

FURTHER ORDERED that plaintiff's claims against defendant Bensalem Township School District are DISMISSED WITH PREJUDICE, *mea sponte*, for the reasons set forth in the foregoing opinion.

BY THE COURT:

s/Joseph S. Lord, III S.J.

IN THE OFFICE OF THE SECRETARY
OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF NICOLE A., a student in the Bensalem Township School District	: SPECIAL EDUCATION : OPINION NO. 246

BACKGROUND

Nicole A. is a 13 year old child who resides with her mother in the Bensalem Township School District (hereinafter referred to as the district). Nicole is a regular eighth grade student who was referred for elevation by her guidance counselor in order to determine her eligibility for enrollment in a program of special education for the gifted. The sole reason for the referral was that Nicole's parent requested the evaluation. A psychologist employed by the district performed the evaluation on January 24, 1983. Based upon the results of the evaluation and a review of other pertinent criteria by a multidisciplinary team, the district concluded that Nicole was not gifted and that no change in her placement was warranted. Nicole's parent was notified of the district's finding of nonexceptionality on January 31, 1983. Accordingly, the district declined to move Nicole from her regular education program to a special education program for the gifted.

Nicole's parent, believing Nicole to be gifted and in need of special education, pursued the administrative remedies available to her under State Board of Education regulations. 22 Pa. Code §13.1 et seq. The due process hearing in this matter was held on November 8, 1984, and was conducted in accordance with 22 Pa. Code §13.33. The hearing officer issued his report on November 29, 1984. He recommended that Nicole be considered nonexceptional and concluded that no special educational placement should be made. Nicole's parent filed exceptions to this decision on December 11, 1984. The district responded to the exceptions on December 14, 1984.

DISCUSSION

I.

The parent's first exception is that the hearing officer erred when he indicated that the parent's exhibits (P-1, P-2, P-3) were not admitted into evidence at the due process hearing. Although we can find no formal request for the admission of P-1, P-2 or P-3 anywhere in the record, we note that the hearing officer relied on these exhibits in arriving at his decision. Furthermore, the district agrees that the parent's exhibits were received into evidence. Therefore, we conclude that P-1, P-2 and P-3 are part of the record in this case and that the parent's first exception is moot.

II.

The issue here is whether Nicole A. is a mentally gifted exceptional child under state law. If Nicole is a mentally

gifted exceptional child, she is entitled to an appropriate program of special education. 24 P.S. §§13-1371(1), 13-1372(3); 22 Pa. Code §13.1; *Lisa H. v. State Board of Education*, 67 Pa. Cmwlth. 350, 447 A.2d 669, n. 6 (1982), *aff'd* 502 Pa. 613, 467 A.2d 1127 (1983).

The special education regulations provide that a mentally gifted exceptional person is a person who possesses:

> Outstanding intellectual and creative ability the development of which requires special activities or services not ordinarily provided in the regular program. Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.

22 Pa. Code §341.1(iv). However, before we can determine whether Nicole qualifies as mentally gifted under this standard, we must first address the parent's direct challenge to the regulation itself. See Exceptions to Hearing Officer's Report (Exceptions), Paragraphs 5(i) and (k), 10, 21, 26, 27.

The Legislature has granted the State Board of Education the power to adopt regulations respecting the education and training of mentally gifted exceptional children. 24 P.S. §13-1372(1); *Lisa H. v. State Board of Education, supra*. The State Board, at 22 Pa. Code §13.22(1), has authorized the Secretary to establish the standards to be utilized in determining a student's eligibility for gifted special education. Those standards are found in the Department's definition of mentally gifted exceptional persons. 22 Pa. Code §341.1(iv).

Section 341.1(iv) was adopted pursuant to the Department's interpretive rule-making power. Therefore, this regulation will be held to be valid if it "tracks" the meaning of the statute it interprets. *Uniontown Area School District v. Pennsylvania Human Relations Commission*, 455 Pa. 52, 313 A.2d 156 (1973). We emphasize that courts traditionally accord some deference to the interpretation of the agency charged with administering the statute. *Uniontown Area School District v. Pennsylvania Human Relations Commission, supra*.

The question here is whether Section 341.1(iv) tracks the meaning of the statutes it interprets. The applicable statutory language is found in Sections 1371(1) and 1372(1) of the Public School Code of 1949. Section 1371(1) defines the term "exceptional children" to mean "children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services. . . ." 24 P.S. §13-1371(1). Section 1372(1) directs the State Board to "adopt and prescribe standards and regulations for the proper education and training of all exceptional children. . . ." 24 P.S. §13-1372(1). There is no further guidance given in the act.

We hold, for the reasons set forth below, that Section 341.1(iv) tracks the meaning of 24 P.S. §§13-1371(1) and 13-1372(1) and, therefore, is valid and has the force of law. First, this regulation specifies those children who have mental abilities which deviate from the average to such an extent that they require special educational services. In so doing, it tracks the intent of the statute that all exceptional persons of school age be properly educated and trained. Second, it is clear that the subject matter of this regulation

is within the special administrative competence of the Department of Education. Consequently, Section 341.1(iv) is entitled to the maximum deference that a court will give to an administrative agency's interpretive rule-making. Third, we find it to be significant that Pennsylvania's legislators, knowing the content of the rule, have continued to provide funding for gifted special education programs. We believe that all of these factors show that the standards which the Department promulgated in 22 Pa. Code §341.1(iv) track the meaning of the statutes and do not violate the legislative intent.

It should be emphasized that the regulation was issued pursuant to proper procedure. Section 341.1(iv) was published in accordance with the requirements of Sections 201 and 202 of the Commonwealth Documents Law, 45 P.S. §§1201 and 1202. See 7 Pa. B. 1100, 1101, 2792, 2793 (1977). The parent had the opportunity to object to the standards set forth in 22 Pa. Code §341.1(iv) when this regulation was first published as proposed rulemaking. 45 P.S. 1201. Furthermore, the parent had the right to present evidence and testimony, including expert educational testimony, to show that the regulation adopted by the Department was unwise. 22 Pa. Code §§13.33(7), 13.32(20). However, we find no such evidence or testimony in the record. Accordingly, we hold that Section 341.1(iv) is within the legislative intent.

Since the challenged regulation tracks the meaning of the statutes it interprets, we conclude that the regulation is valid and has the force of law in this case. *Uniontown Area School District v. Pennsylvania Human Relations Commission, supra.*

III.

We now must determine whether Nicole is a mentally gifted exceptional person under 22 Pa. Code §341.1(iv). To be deemed mentally gifted, the child must have an IQ of 130 or higher. In addition, a school district *may* admit students into gifted programs when other educational criteria *strongly* indicate gifted ability. 22 Pa. Code §341.1(iv).

The documentary evidence and testimony of record indicate that Nicole's IQ lies somewhere between 106 and 121 (N.T. 13, 29, 58, 59, 60, 62, 63; P-1, P-2, SD-1). Although the parent argues that Nicole's IQ is 121, she does not contend that her daughter's IQ is 130 or greater (N.T. 29, 44, 141). Instead, the parent asserts that other educational criteria indicate that Nicole has gifted ability (N.T. 125, 126, 142, 154), and that the district erred when it refused to admit Nicole into its gifted program (Exceptions, Paragraphs 10, 11, 22, 23, 24).

It is important to emphasize here that the last sentence of Section 341.1(iv) states that a school district "may" admit students into gifted programs based on criteria other than intelligence quotient. Therefore, the decision to admit Nicole under this standard is within the sound discretion of the district and is not within our purview to order or direct. Even if Nicole did qualify under the standard set forth in the last sentence of Section 341.1(iv), the Secretary could not order her admittance in view of the discretion which is given to the district under that standard. Absent a showing that a public agency's refusal to exercise its discretionary authority was selectively applied to a party, such refusal is not illegal and will not be reversed upon review. *Summit School, Inc. v. Department*

of Education, 43 Pa. Cmwlth. 623, 402 A.2d 1142 (1979). The parent does not argue selective application in this case, and none appears in the record.

Consequently, the parent's argument that Nicole is gifted because other educational criteria in the profile indicate gifted ability is moot. However, in order to fully address the parent's argument, we will determine whether the hearing officer properly concluded that Nicole did not qualify for admission under the last sentence of Section 341.1(iv).

22 Pa. Code §341.1(iv) provides, in part, that persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria "strongly" indicate gifted ability. The question, therefore, is whether there are strong indications of giftedness in Nicole's profile.

The district testified that the other educational criteria it utilizes in order to determine giftedness are teacher recommendations, reading and data comprehension, the ability to read several years above grade level, leadership qualities, creativity, and the ability to work independently (N.T. 26). The district further testified that the student's entire school record is reviewed, both by the guidance counselor and by the multidisciplinary team, as part of the effort to determine whether the profile indicates giftedness (N.T. 46-48).

The witnesses for the district considered these criteria and concluded that Nicole's profile did not strongly indicate gifted ability (N.T. 14, 55, 61-62, 86, 88, 108-109, 112).[1] The district's testimony is substantial, and is sup-

[1] The parent has suggested that the teachers who completed Multidisciplinary Team Reports for Nicole (P-2, SD-2) did not know they were

ported by the exhibits which both parties submitted (P-2, SD-2). The parent supports her position with selective references to the profile (N.T. 140-142), and her testimony that Nicole is able to discuss constitutional issues (N.T. 153-155). Based upon our review of the entire record, we find substantial evidence that Nicole's profile does not strongly suggest gifted ability. Although it is clear that Nicole is a bright, motivated and involved student, it is equally clear that the standard established by the last sentence of Section 341.1(iv) has not been met in this case.

IV.

The parent continues to argue that education is a fundamental constitutional right in Pennsylvania and that Nicole has been denied due process and equal protection (Exceptions, Paragraphs 3, 5, 12, 14, 15). We hold that this argument is without merit. Both the federal and state courts have consistently held that a right to education is not considered to be a fundamental right or liberty. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278 (1973); *Danson v. Casey,* 484 Pa. 415, 399 A.2d 360 (1979). The right to public education in Pennsylvania is statutory and not constitutional. *O'Leary v. Wisecup,* 26 Pa. Cmwlth. 538, 364 A.2d 770 (1976); *Lisa H. v. State Board of Education, supra.* The right which has been created by Pennsylvania's constitution is a right to participation in the educational process. *Dallum v. Cumberland Valley School District,* 391 F.Supp. 358

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assessing Nicole's need for gifted special education (Exceptions, Paragraph 9(b)). This suggestion clearly is not supported by the record (N.T. 112-113; SD-2, Exhibits "D" and "E"). We note that the parent did not avail herself of the opportunity to question the teachers directly. 22 Pa. Code §13.32(19).

(M.D. Pa. 1981); *Lisa H. v. State Board of Education, supra*. A student who is not exceptional is not entitled to a particular level or quality of education. *Danson v. Casey, supra; Lisa H. v. State Board of Education, supra*.

Since the record contains substantial support for the hearing officer's finding that Nicole is not a mentally gifted exceptional person, we hold that Nicole has no proerty [sic] interest which is entitled to constitutional due process or equal protection safeguards.

V.

The parent argues that special education programs are not meant for gifted and talented persons, and that the provision of special education to gifted and talented persons is not a legitimate state objective (Exceptions, Paragraphs 5(e) and (j), 28). These exceptions are easily dismissed.

With respect to the first exception, we note that both the Commonwealth Court and the Supreme Court have held that gifted and talented students are properly included within the definition of exceptional persons. *Lisa H. v. State Board of Education, supra; Central York School District v. Department of Education*, 41 Pa. Cmwlth. 383, 399 A.2d 167 (1979).

As to the second exception, we remind the parent that the courts of Pennsylvania "will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education" when considering laws which relate to the public school system. *Danson v. Casey, supra*, 484 Pa. at 426, 399 A.2d at 366.

VI.

The parent also contends that the special education due process procedures (22 Pa. Code §§13.31, 13.33 are not appropriate (Exceptions, Paragraphs 3, 13, 14, 16), and that Nicole was denied her right to an impartial hearing officer (Exceptions, Paragraph 17).

The special education due process regulations were adopted under the State Board's interpretive rule-making powers. We believe that these regulations track the intent of 24 P.S. §13-1372(1)—that "all exceptional children" be properly educated and trained—by assuring, through a series of formal procedures, that "all" exceptional persons of school age residing in Pennsylvania are identified. We note that the due process procedures may be initiated by a school district (22 Pa. Code §13.32) or by a parent (22 Pa. Code §13.33), thereby increasing the chances that the legislative mandate will be achieved. Since the special education due process regulations track the intent of the statute, we conclude that Sections 13.31 and 13.33 are valid and have the force of law. Therefore, we dismiss this exception.

The next question is whether Nicole was denied the right to an impartial hearing officer in this case because the hearing officer voiced an opinion regarding the validity of the test used by the district to determine giftedness (N.T. 94-96). Although we agree that the hearing officer should not have stated his opinion as he did, we do not believe that this incident, standing alone, was sufficient to constitute the denial of an impartial hearing officer.

Our review of the record convinces us that the hearing conducted in this matter was impartial and fair. The hearing officer consistently displayed great patience throughout a very difficult hearing (N.T. 132, 133, 134,

159). He was careful to allow the parent to make the record she wished (N.T. 19, 22, 38-39, 51-52, 72, 86, 88, 89-91, 113-114, 125), and attempted to help her on a number of occasions (N.T. 84, 85, 153). The hearing officer also asked for evidence that would enable him to know and understand Nicole (N.T. 37, 85, 125, 126, 153, 154), and noted the evidence which did so (N.T. 153, 154). At one point, the hearing officer requested that the district consider certain evidence even though that evidence had not accompanied the parent's request that Nicole be allowed into the gifted program (N.T. 54-55). In addition, the hearing officer struck certain statements from the record when requested to do so by the parent (N.T. 95).

Based upon a *careful* review of the entire record, we find that this hearing was conducted before an impartial hearing officer. Accordingly, we dismiss this exception.

We also disagree that the hearing in this matter was conducted "backwards" (Exceptions, Paragraph 16). Since a school district determines whether a student is gifted, it only makes sense for the hearing to begin with the school district's explanation of the basis for its decision. This procedure promotes efficiency and economy in the hearing process because the parties know from the outset what is in dispute and what is not.

Although the parent twice stated that she believed the order of proof was backwards, she did not formally object (N.T. 42, 105). Moreover, there was no prejudice. The parent was given wide latitude during the hearing and was permitted to develop the record as she wished.

We dismiss the parent's allegation that she was physically unfit for the hearing and severely prejudiced thereby (Exceptions, Paragraph 3(d)). The parent did not raise this

objection at the hearing and there is no evidence in the record to support it *Frankford Hospital v. Department of Public Welfare*, 77 Pa. Cmwlth. 448, 466 A.2d 260 (1983).

Finally, we will strike Appendix "A" to the parent's Exceptions. 22 Pa. Code §13.32(14) provides that the decision of the hearing officer shall be based "solely" upon the evidence presented at the hearing. This limitation is particularly important in light of the requirement of 22 Pa. Code §13.32(21) that the hearing officer render a decision in writing no later than 20 days after the hearing.

VII.

The parent argues that Nicole's score on the Wechsler Intelligence Scale for Children-Revised (WISC-R) is not a valid measure of her giftedness because this test is not validated for this purpose (Exceptions, Paragraphs 5(i), 10, 26). The parent contends that a "least restrictive means" test should be utilized (Exceptions, Paragraph 5(g)). The parent defines this test as Nicole's "achievement in school at the present time" (N.T. 126).

We hold, for the reasons set forth in Section II above, that the standard in Section 341.1(iv) is valid and that the parent's least restrictive means test need not be utilized by the district.

We likewise dismiss the parent's exception to the district's use of the WISC-R. There is no dispute that the WISC-R measures a complex range of abilities and traits (N.T. 86, 91). It is also clear that the gifted curriculum designed by the District is written for and geared to the child who is able to achieve a score of 130 or greater on the test (N.T. 22-25). The district's witness also testified, without dispute, that the WISC-R is a valid and reliable meas-

ure of the abilities it purports to measure (N.T. 92-94). Accordingly, we find that the district's use of the WISC-R is appropriate and dismiss the parent's exception.

VIII.

Finally, the parent argues that the district's gifted special education programs do not comply with the requirement of 20 U.S.C. §1412(5) (B) that, to the maximum extent appropriate, handicapped children be educated with children who are not handicapped (Exceptions, Paragraph 19). We dismiss the parent's exception. First, we find that the parent lacks standing to raise this issue. Second, there is substantial evidence directly contradicting the parent's claim (N.T. 32-33). Third, the Education of the Handicapped Act, 20 U.S.C. §1400 et seq., does not apply to Pennsylvania's gifted special education programs.

Accordingly, we make the following:

ORDER

This 8TH day of FEBRUARY, 1985, it is hereby ordered and decreed that the hearing officer's findings and recommendations in this matter are adopted and the parent's exceptions are dismissed.

s/Margaret A. Smith
Secretary of Education

NO. 86-1771
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

STUDENT ROE, a Minor, By Her Next Friend
and Natural Guradian, M. Roe
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
SECRETARY OF EDUCATION, et al.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether petitioner has a protected property interest in an educational program for gifted students which is protectible by due process?

II. Whether, in light of petitioner's failure to establish the existence of a protected property interest, the courts below correctly declined to address the question of what process would be "due" in protecting it?

III. Whether Pennsylvania's establishment of special educational programs for gifted students is rationally related to a legitimate state purpose?

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JURISDICTION

The order of the Court of Appeals for the Third Circuit affirming judgment on the pleadings for the Commonwealth of Pennsylvania officials was entered on February 2, 1987. The petition for writ of certiorari was docketed on May 1, 1987.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pa. Stat. Ann. tit. 24, § 13-1371(1) (Purdon)(Supp. 1986) provides:

> The term "exceptional children" shall mean children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes.

The regulation codified at 22 Pa. Code § 341.1(iv) provides in relevant part:

Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.

SUMMARY OF ARGUMENT

This petition for a writ of certiorari raises no special or important issues for review, and decisions below are consistent with the decisions of this Court. The petition for writ of certiorari should be denied.

ARGUMENT

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS WHY THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI.

Petitioner, Student Roe, seeks to have this Court review a decision of the Court of Appeals which affirmed the United States District Court for the Eastern District of Pennsylvania's granting of judgment on the pleadings in favor of Commonwealth of Pennsylvania officials. Petitioner states no "special or important" reasons for review and decision by this Court. The petition for certiorari is nothing more than a request to have this Court make a third review of Student Roe's allegations. The Petition for a Writ of Certiorari should be denied.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURTS BELOW CORRECTLY DETERMINED THE ISSUES RAISED BY THE PETITION.

A. Petitioner has No Property Interest In An Educational Program For Gifted Children.

Pennsylvania law provides that students with an IQ of 130 or above "shall be assigned" to a program for the gifted. 22 Pa. Code § 341.1(iv), emphasis added. Petitioner concedes, however, that her IQ is, at most, 121. Pet. at 17, Pet. App. at 20a. The law provides that a "limited number" of such students "may" be assigned to a gifted program. 22 Pa. Code § 341.1(iv). Such an assignment is not, however, a matter of right, but is committed to the sound discretion of the local school district

and may be refused for any constitutionally permissible reason. Pet. App. at 20a-21a. As this Court has held, such a scheme creates no interest protected by the Due Process Clause, Olim v. Wakinekona, 461 U.S. 238, 249 (1983), and the courts below correctly rejected this claim. Pet. App. at 3a, 8a.

B. The Courts Below Correctly Declined to Address the Question of What Process Might Be Due to Protect a Nonexistent Interest.

In a confused and convoluted argument, the petitioner says that her application for entry into a special educational program for gifted students should have been reviewed under a "least

restrictive alternative" standard. Pet. at 31-34. It is not at all clear what this means -- the petitioner is not institutionalized, and there is no suggestion in the record that she is subject to any "restrictions" -- but in any case there is no need to reach this question. As demonstrated in the proceeding section, the petitioner's admission into such a program is not a matter of right, but is entrusted to the sound discretion of her local school district. There is therefore no occasion to consider what standard might apply if things were otherwise, and the courts below correctly refrained from doing so. Pet. App. at 9a, n.3.

C. The Establishment Of An Educational Program For Gifted Students Does Not Violate The Equal Protection Clause.

The petitioner's final argument is that Pennsylvania, by establishing special educational programs for gifted students, has violated the Equal Protection Clause. In San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 33-35 (1973), however, this Court held that education is not a fundamental right. Accordingly, as held by the District Court and the Third Circuit, the classification of students as "gifted" or "non-gifted" for purposes of a special educational program need only meet the "rational relation" test. Vance v. Bradley, 440 U.S. 93, 96-97 (1979); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125 (1978).

To be constitutionally infirm under this standard, the gifted program regulations would have to be "so unrelated to any combination of legitimate purposes," Vance, supra, 440 U.S. at 97, that it can only be concluded that state officials acted irrationally. Accord, U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980). However, this is clearly not the case. As the district court said, "surely, it is both rational and legitimate for Pennsylvania to provide special education to gifted children in order to develop the abilities of those students most likely to assume leadership roles in areas of endeavor which are intellectually demanding." Pet. App. at 12a. This challenge, then, is also without merit.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

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